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June 18, 2008

Via Email: [jjorgensen@sidley.com](mailto:jjorgensen@sidley.com)

Jay T. Jorgensen, Esq.  
Sidley Austin, LLP  
1501 K St. NW  
Washington D.C. 20005

Re: Tyson Request for Production of Documents Concerning  
Modeling Documents ("Modeling RFPs")

Dear Jay,

This letter is written in response to your recent email of June 17, 2008 (copy attached). There are several errors in your email that need correction.

First, the model – related materials produced by the State did and do comply with the State’s discovery obligations under FRCP 26(a)(2) (expert reports) and 34(b)(2) (responses to request for production). I do not understand what you mean when you say the State did not comply with its “discovery obligations because they are not in a form that is reasonably useable.” As I hope I made clear in my letter of June 13, 2008 to Michael Bond, the information that was produced to Defendants as part of Drs. Engel and Wells considered materials: (1) included the “documents” (computer files) that were requested by Tyson in the Tyson RFP; (2) were not “diagggregated” (as you claim in the Motion to Compel) and (3) were produced in the same form as they are maintained and used by Drs. Engel and Wells on their computers.

You are also incorrect in implying that our discussions on these topics were complete (so that your obligation to meet and confer was satisfied) and your claim that I “refused” to produce the models in the same format as they are maintained by Drs. Engel and Wells. My recollection of our discussions is that I told you that we were still preparing a detailed, supplemental response to the Model RFPs that would specifically identify which files produced in the Expert’s considered materials responded to each

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particular request for production. I also recall telling you that I did not know whether or not we had produced or could feasibly produce the materials as they exist on each of the Expert's computers. But, I don't recall any "refusal" – only that I was still looking into the issue. As it turned out, and as I explained in my letter of June 13, 2008 (first paragraph) and again here, the State did produce the models in Drs. Engel and Wells considered materials as they were kept on their respective computers. What's more, you also have a detailed explanation of the modeling files that were produced that matches the produced files with the individual requests for production. Obviously your Motion to Compel was premature (and, indeed unwarranted). If you had simply allowed me to complete my work responding to your questions you would have seen that all of the information had been properly produced pursuant to FRCP 26 and 34 as part of the Engel and Wells considered materials and that the State's supplemental Response (June 13, 2008 letter to M. Bond) clearly identified which files responded to each individual request for production.

I believe the State has no obligation under Rules 26 or 34 to answer your new questions about Dr. Wells' expert analysis that you pose in yesterday's email. These questions would typically be posed to Dr. Wells in a deposition. However, in the spirit of continued cooperation I have endeavored to secure answers to these additional questions as follows:

**Question No. 1**

What were the different computers (manufacturer, model number, CPU type and operating system) used by Dr. Wells for the calibration and scenario runs described in his expert report?

**Answer No. 1**

Dell laptops, one Core Duo 2.2 GHz and one Core2 Duo 2.4 GHz; one desktop Intel core2 duo e7000; Windows XP Pro.

**Question No. 2**

What were the FORTRAM (sic) compiler options used by Dr. Wells to create the executables for these calibration and scenario runs?

**Answer No. 2**

**Calibration runs:**

```
/nologo/O3/Og/Qparallel/include:"C:\Program files\AnCAD\MATFOR4\include\if9"  
/real_size:64 /module:"Release\" /object:"Release\" /libs:static /threads /winapp /c
```

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```
/OUT:"Release\w2_ivf.exe" /NOLOGO /LIBPATH:"C:\Program Files\AnCAD\MATFOR4\lib\if9" /MANIFEST /MANIFESTFILE:"C:\scott\research\corps of engineers\tomcole\w2code\version 36\ivf\win32\w2_code\w2-intel\WinApp1\release\w2_ivf.exe.intermediate.manifest" /SUBSYSTEM:WINDOWS /IMPLIB:"C:\scott\research\corps of engineers\tomcole\w2code\version 36\ivf\win32\w2_code\w2-intel\WinApp1\release\w2_ivf.lib" fml.lib fgl.lib spml.lib
```

ALSO only for the following subroutines TEMPERATURE, TRANSPORT, WQCONSTITUENTS:

```
/nologo /O3 /Og /Qparallel /include:"C:\Program Files\AnCAD\MATFOR4\include\if9" /real_size:64 /module:"Release\\" /object:"Release\\" /libs:static /threads /winapp /c /Qopenmp
```

ALSO only for WATER QUALITY:

```
/nologo /Og /Qparallel /include:"C:\Program Files\AnCAD\MATFOR4\include\if9" /real_size:64 /module:"Release\\" /object:"Release\\" /libs:static /threads /winapp /c
```

**Scenario runs:**

```
/nologo /O3 /Og /Qparallel /real_size:64 /module:"Release\\" /object:"Release\\" /libs:static /threads /c
```

```
/OUT:"Release\fhab.exe" /INCREMENTAL:NO /NOLOGO /MANIFEST /MANIFESTFILE:"C:\scott\research\corps of engineers\tomcole\w2code\NEW code enhancements\fish habitat criterion\fhab\release\fhab.exe.intermediate.manifest" /SUBSYSTEM:CONSOLE /IMPLIB:"C:\scott\research\corps of engineers\tomcole\w2code\NEW code enhancements\fish habitat criterion\fhab\release\fhab.lib"
```

ALSO only for the following subroutines TEMPERATURE, TRANSPORT, WQCONSTITUENTS:

```
/nologo /O3 /Og /Qparallel /real_size:64 /module:"Release\\" /object:"Release\\" /libs:static /threads /c /Qopenmp
```

ALSO only for WATER QUALITY:

```
/nologo /Og /Qparallel /real_size:64 /module:"Release\\" /object:"Release\\" /libs:static /threads /c
```

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**Question No. 3**

Was the model executable currently on the Portland State University website: <http://www.cee.pdx.edu/w2> (for Version 3.6) the executable used for these calibration and scenario runs?

**Answer No. 3**

The model executable on the PSU website was used for the calibration runs. The executables for the scenario runs were included in the run directories for the scenario runs produced in the Wells' considered materials. The source code for the scenario runs was included in the file "source code.zip".

**Question No. 4**

There are multiple calibration run directories in the modeling documents produced. Which calibration run directory (e.g., Run 200, 201, 202, etc.) corresponds to the calibration results in Dr. Wells' expert report?

**Answer No. 4**

Run143 was the run used in the Wells' Expert Report.

I trust that this letter satisfactorily explains the situation and that you will immediately withdraw the Motion to Compel. I also suggest that we schedule the Engel and Wells depositions so that any other modeling questions may be expeditiously answered.

Very Truly Yours,



David P. Page

DPP/sdk

Enc.

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cc: Michael Bond (via email)

**David Page**

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**From:** Jorgensen, Jay T. [jjorgensen@sidley.com]  
**Sent:** Tuesday, June 17, 2008 12:45 PM  
**To:** Ward, Liza; David Page  
**Cc:** Bond, Michael R.  
**Subject:** RE: Following up on your call

Liza,

I have checked with the other defendants and they agree that the Motion to Compel is well founded. The model-related materials produced by the state do not comply with the plaintiffs' discovery obligations because they are not in a form that is reasonably usable. For that reason, we requested that plaintiffs produce exact copies of the models in the form they are maintained by plaintiffs. We have conferred with plaintiffs on this matter multiple times in an effort to obtain the information that the plaintiffs were required to previously produce. As only one example, during the week of June 2-6 I spoke with David Page on the phone about this several times and asked if plaintiffs would produce the models in the same format they are maintained by the plaintiffs' experts. He refused, stating that such a production is not (in his view) technically feasible because portions of the plaintiffs' models reside on three separate computers.

However, defendants always want to resolve issues without court intervention. It is possible that we will be able to overcome the obstacles created by plaintiffs' production if the plaintiffs provide additional information about your models and the way they are maintained. Would you be willing to answer the following questions? If so, I can commit that defendants will take this information to their experts in an attempt to resolve the uncertainties addressed in the Motion to Compel. If those uncertainties are resolved, we may be able to withdraw the motion:

1. What were the different computers (manufacturer, model number, CPU type and operating system) used by Dr. Wells for the calibration and scenario runs described in his expert report?
2. What were the FORTRAM compiler options used by Dr. Wells to create the executables for these calibration and scenario runs?
3. Was the model executable currently on the Portland State University website: <http://www.cce.pdx.edu/w2> (for Version 3.6) the executable used for these calibration and scenario runs?
4. There are multiple calibration run directories in the modeling documents produced. Which calibration run directory (e.g., Run 200, 201, 202, etc.) corresponds to the calibration results in Dr. Wells' expert report?

Jay

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**From:** Ward, Liza [mailto:lward@motleyrice.com]  
**Sent:** Tuesday, June 17, 2008 12:02 PM  
**To:** Jorgensen, Jay T.  
**Cc:** Bond, Michael R.  
**Subject:** RE: Following up on your call

Jay,

We still haven't heard anything from you regarding Defendants' position on the State's Motion to Strike. Unless I hear from you by 3 p.m. (Eastern), we will assume that the remaining Defendants share Tyson's position that they object to the relief sought by the State's Motion to Strike and will file the same.

Thanks.

**Elizabeth "Liza" C. Ward** | Attorney at Law | Motley Rice LLC  
28 Bridgeside Blvd. | Mt. Pleasant, SC 29464 | lward@motleyrice.com  
o. 843 216-9280 | c. 843 834 2514 | f. 843.216.9450

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**From:** Jorgensen, Jay T. [mailto:jjorgensen@sidley.com]  
**Sent:** Monday, June 16, 2008 12:00 PM  
**To:** Ward, Liza  
**Cc:** Bond, Michael R.  
**Subject:** Following up on your call

Liza,

Thanks for speaking with me this morning. To summarize our conversations, you asked whether defendants would be willing to withdraw their motion to compel production of working copies of plaintiffs' models. If not, plaintiffs intend to file a motion to strike. The grounds for the motion are that plaintiffs believe they are still meeting and conferring with defendants on this issue.

I told you I would pass this request on to the other defendants, since the motion was filed on behalf of all of them. I have passed on your

6/18/2008

request, and will let you know as soon as I have received a response from each of the defendants.

Jay

\_\_\_\_\_  
Jay T. Jorgensen | Sidley Austin LLP  
1501 K St NW, Washington D.C. 20005 | 202.736.8020

Sidley Austin LLP mail server made the following annotations on 06/16/08, 11:00:24:

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